

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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*IN RE: NEW ENGLAND COMPOUNDING * MDL NO. 13-02419-FDS
PHARMACY, INCORPORATED *
PRODUCTS LIABILITY LITIGATION *
* * * * *

BEFORE THE HONORABLE JENNIFER C. BOAL
UNITED STATES MAGISTRATE JUDGE
STATUS CONFERENCE
September 25, 2013

Courtroom no. 17
1 Courthouse Way
Boston, Massachusetts 02109

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13 Hospital.

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P R O C E E D I N G S

THE CLERK: All rise.

The United States District Court for the District of Massachusetts is now in session.

The Honorable Jennifer C. Boal presiding.

You may be seated.

Today is September 25, 2013. We're on the record in the matter of New England Compounding Pharmacy, Inc., Products Liability Litigation.

I would first like to ask counsel appearing for Plaintiffs' Steering Committee in court to identify yourselves and then on the phone to identify yourselves.

MS. PARKER: Good morning, your Honor. Kristen Johnson Parker for the Plaintiffs' Steering Committee.

MR. FENNELL: Good morning, your Honor. Patrick Fennell from Crandall & Katt, Roanoke, Virginia, for the Plaintiffs' Steering Committee.

MS. DOUGHERTY: Good morning, your Honor. Kim Dougherty on behalf of the Plaintiffs' Steering Committee.

THE CLERK: Do I have anyone appearing by phone for the Plaintiffs' Steering Committee?

(No response.)

THE CLERK: We're going to ask counsel in the front to my left to identify yourself.

MR. GROSSMAN: Good morning, your Honor. Steve

1 Grossman from Montgomery McCracken on behalf of the Inspira
2 Health Networks and inspira Medical Centers in New Jersey.

3 MR. GERLING: Good morning, your Honor. Brian
4 Gerling for Insight Health Corp.

5 MR. MOYERS: Good morning, your Honor. Adam Moyers
6 from Batten Lee in Raleigh, North Carolina, for Surgery
7 Center of Wilson, North Carolina.

8 MS. MARZULLO: Good morning, your honor. Michelle
9 Marzullo, of Marks, O'Neill, O'Brien, Doherty & Kelly, on
10 behalf of the Baltimore Pain Management Center in Baltimore,
11 Maryland.

12 MR. ALTHOUSER: Good morning, your Honor. My name
13 is Tom Althouser. I'm from Maryland, here on behalf of the
14 non-party objector, Harford County Ambulatory Surgery
15 Center, LLC.

16 MR. APELIN: Your Honor, good morning. Anthony
17 Apelin on behalf of non-party objector Pain Associates of
18 Charleston.

19 MS. WINT: Good morning, your Honor. Cari Wint,
20 from Debevoise & Plimpton, on behalf of Tristar Centennial
21 Medical Center, Sahara Surgery Center, and Surgical Park
22 Center.

23 THE CLERK: In the gallery, starting from my left
24 to the right.

25 MR. HUGO: Michael Hugo, Framingham, Massachusetts,

1 appearing for the plaintiffs.

2 MS. WATSON: Mary-Rose Watson, representing Ocean
3 State Pain Management Center.

4 MS. TAYLOR: Kiersten Taylor, Committee of
5 Unsecured Creditors.

6 MR. MANTALOS: Good morning, your Honor. Matthew
7 Mantalos on behalf of Ameridose.

8 MR. TRANEN: Good morning, your Honor. Daniel
9 Tranen for New England Compounding Pharmacy.

10 THE COURT: Good morning, everyone. I am not going
11 to ask the persons on the phone to identify themselves. I
12 do intend to follow, where practicable, Judge Saylor's Order
13 No. 4, and, in that sense -- and that had to do with the
14 telephone conferences -- I am going to ask counsel on the
15 phone, it seems as if they've already done that, to please
16 minimize the background noise or other interference during
17 the call and to normally mute their telephones, obviously,
18 unless they're speaking.

19 And I am going to ask the people in the room, for the
20 benefit of those on the phone, when they speak, if they
21 could speak into the microphones. If you don't have a
22 microphone in front of you, I would ask that you go to the
23 podium, if you wish to speak, and speak into that
24 microphone.

25 I did want to mention before we begin that an Attorney

1 Chris O'Hara has entered an appearance on behalf of some of
2 the defendants. Our children attended nursery school
3 together some time ago, and Mr. O'Hara and my husband play
4 hockey together on occasion. I don't think that's a
5 conflict. As far as I know, it's all been amicable on the
6 ice.

7 (Laughter.)

8 THE COURT: But if anyone believes that's an issue,
9 they are welcome to bring that to my attention.

10 I have you all here today for a status conference, as
11 opposed to oral argument. I am hoping to develop a system
12 to work through the many objections in both a thoughtful and
13 efficient manner. I think the parties made some great
14 strides toward that in the chart that was prepared by the
15 Plaintiffs' Steering Committee.

16 So what I would like to do is first go through at least
17 my understanding of where we are with respect to the
18 subpoenas and their objections, and then propose a framework
19 for dealing with them, and hear from you all as to your
20 thoughts and whether that's a good framework or not.

21 So, as I understand it, the Plaintiffs' Steering
22 Committee has issued 80-plus subpoenas. Objections have
23 been filed to, perhaps, 40-plus of the subpoenas.

24 On August 1 Judge Saylor granted the motion to quash
25 with respect to the medical records of nonplaintiffs, and

1 then referred the remaining objections and motions to quash
2 to me for decision.

3 On August 6, as I've mentioned, the Plaintiffs'
4 Steering Committee filed a report and a chart for the
5 purpose of identifying the remaining issues, and had
6 indicated in that report that there had been some
7 accommodations to some of the objectors' concerns.

8 Then some objectors filed pleadings saying they didn't
9 quite agree with everything that was in the plaintiffs'
10 characterization of the outstanding issues.

11 On August 15 I understand Judge Saylor issued a
12 mediation order with an opt-in procedure, and the parties
13 that opted in, for those parties discovery would be stayed.

14 More recently, some parties have filed pleadings
15 indicating that the parties have worked out some other
16 issues.

17 So what all that means is that I need some
18 clarification as to where we are with the subpoenas and
19 their objections. So I am looking for input from the
20 parties, again in the most cost-efficient and effective way.

21 I would propose that the parties work together to amend
22 and/or change the chart that was initially proposed by the
23 Plaintiffs' Steering Committee. I do not need further
24 briefing. It is simply to identify and narrow, if possible,
25 the live issues that I need to decide. And I would propose

1 that the parties work together and file an amended chart by
2 October 16.

3 I fully recognize, despite everyone's best efforts,
4 there still might be some disagreements as to what is in the
5 chart, and if there are any objections to what is in the
6 chart or the characterization -- if you cannot work it
7 out -- that those objections be filed by October 23. But no
8 one should file anything more than four pages. I think it's
9 really identifying which issues are live or the
10 characterization of that issue.

11 I would then propose to hold oral argument on
12 November 7. I understand that Judge Saylor has a conference
13 scheduled for that afternoon at 1:30, and in the hope of
14 minimizing travel for the parties, I would propose to do it
15 at ten o'clock that morning.

16 Again, for the future reference, I am not sure what
17 Judge Saylor would refer to me. I anticipate there might be
18 other issues coming my way. What I will try to do is where
19 there is a conference in the afternoon, I will try and
20 schedule oral argument on those issues on the morning before
21 those conferences.

22 All right. So I will hear from the Plaintiffs'
23 Steering Committee first, if you have any suggestions,
24 comments, etc.

25 MS. PARKER: Thank you, your Honor.

1 If I may, I think I'll sit so the microphone will
2 reach.

3 THE COURT: Yes.

4 MS. PARKER: Thank you.

5 Kristen Johnson Parker, with Hagens, Berman, Sobol
6 Shapiro, for the Plaintiffs' Steering Committee, your Honor.

7 I think that your Honor's suggestion is a very workable
8 one. The purpose of providing a chart was to try and
9 grapple with the many cross-cutting issues that were
10 appearing in many subpoenas, in the hope that we may be able
11 to present this to your Honor in a manner that would enable
12 some cross-cutting decisions to track --

13 THE COURT: And I think it was a very good effort.
14 It's just that you've moved on in some ways from that.

15 MS. PARKER: Yes, certainly.

16 And so one of the things that we have prepared for
17 today, your Honor, was actually an updated version of that
18 chart. I think I will, with the Court's permission, have
19 Mr. Fennell point out for you some of the changes that are
20 reflected in this chart, not for purposes of arguing -- and
21 I hear you when you say we should be speaking with the
22 defendants to come up on an agreed chart -- but so that
23 you're aware of some material changes with a few of the
24 objections.

25 If I may, I will hand this up to the Court, and I also

1 have copies for maybe not all but most of the defense
2 counsel.

3 (Pause in proceedings.)

4 MR. FENNEL: Good morning, your Honor. Patrick
5 Fennell for the Plaintiffs' Steering Committee.

6 I just want to give the Court a quick update on where
7 we stand in terms of the numbers and so forth. As of today,
8 according to the Plaintiffs' Steering Committee's numbers,
9 there are 31 outstanding objections and/or motions to quash
10 that still need to be resolved.

11 Since the last update to our chart, there have been
12 three clinics that have been withdrawn from our chart
13 because the objections have been resolved in one way or
14 another, and that is: Erlanger Health Systems, Carilion
15 Surgery Center of New River Valley, and HCA Health Services
16 of Tennessee, also known as "Centennial Medical Center."

17 In addition to those, South Bend Clinic has opted into
18 the mediation, and, therefore, we will not be pursuing any
19 further action against them with regard to this subpoena.

20 We also have -- High Point Surgery Center has -- their
21 objections have been resolved. They submitted documents
22 pursuant to the Plaintiffs' Steering Committees's
23 accommodations. So we're satisfied with their production,
24 and we're withdrawing -- or their objections are withdrawn.

25 In addition to that, there's -- we've identified some

1 clinics that have produced documents pursuant to the
2 subpoena, and we just wanted to advise the Court that High
3 Point Surgery Center has produced documents.

4 Image Guided Pain Management of Virginia has produced
5 documents.

6 Carilion Surgery Center of New River Valley -- that's
7 also in Virginia -- has produced documents.

8 The Orlando Center for Outpatient Surgery has produced
9 documents.

10 Berlin Interventional Pain Management has produced
11 documents. That's in Maryland.

12 And Marion Pain Management of Ohio has produced
13 documents.

14 Now, not all of those clinics that have produced
15 documents had filed objections, but, just so your Honor
16 knows, at this point, there are -- those six clinics have
17 produced documents pursuant to the subpoenas.

18 MS. PARKER: And, your Honor, I would also like to
19 bring to your attention something that has gone on on the
20 bankruptcy side of things that has an impact on some of the
21 objections to the subpoenas before you.

22 As your Honor is aware, the Plaintiffs' Steering
23 Committee served subpoenas that asked for protected health
24 information, including the names and contact information of
25 patients who had received injections of MPA and other New

1 England Compounding Products.

2 Judge Saylor discussed and heard argument from the
3 parties on this in front of him at a status concerns and
4 asked for supplemental briefing on this issue before he made
5 a decision.

6 At the same time on the bankruptcy side of things,
7 Judge Boroff issued an order that required clinics to
8 produce patient names -- and let me be specific about
9 this -- issued an order that required clinics who appeared
10 on the CDC's list of entities that had received the
11 contaminated MPA, to produce patient-identifying information
12 to the Trustee, the Creditors' Committee, and lead counsel
13 in the MDL.

14 Because Judge Boroff had issued -- and Judge Boroff did
15 that for the purpose of sending notice of any potential bar
16 dates to potential claimants against the NECC estate.

17 Because Judge Boroff had issued that order, the PSC
18 then advised Judge Saylor that we would no longer be
19 separately pursuing to recover that information pursuant to
20 our subpoenas in the MDL.

21 The primary -- the sole purpose of requesting that
22 information had been to provide notice, and since that was
23 accomplished through the Bankruptcy Court's exercise of its
24 bankruptcy powers related to the bar date proceedings, the
25 PSC has dropped that request.

1 Dropping that request, just to state on the record, I
2 know we have many people on the line, and many pain clinics
3 listening to this, that goes for all clinics. So the PSC
4 will no longer be trying to recover patient-identifying
5 information from clinics pursuant to our subpoenas.

6 So I bring that to the Court's attention as something
7 that has been resolved.

8 I would also take this opportunity to state that, in
9 response to many clinics' objections, we did make
10 accommodations, which your Honor referred to, and those
11 accommodations would similarly apply to all clinics who have
12 objected to subpoenas.

13 THE COURT: Anything else from the Plaintiffs'
14 Steering Committee?

15 MS. PARKER: My only other comment, your Honor, is
16 on timing, and I think that gets into why we're here. So if
17 you'll indulge me for a minute.

18 The Plaintiffs' Steering Committee served these
19 subpoenas for a variety of purposes. The primary purpose
20 was to recover information from clinics that showed the
21 liability of New England Compounding Center and related
22 corporate affiliates Ameridose and Medical Sales Management,
23 as well as insiders at those companies: Doug Conigliaro,
24 Barry Cadden, Lisa Conigliaro Cadden, Carla Conigliaro and
25 Greg Conigliaro.

1 As your Honor knows, you had permitted an inspection of
2 NECC early on. We've also had some informal discovery
3 produced by NECC to date. That information only gives us
4 part of the picture. The reality here is that this national
5 health tragedy could not have occurred without clinics,
6 doctors, and hospitals purchasing NECC products, storing
7 NECC products, and injecting NECC products.

8 Another way to put it is that this contaminated MPA
9 would not have been injected into people's spines without
10 the clinics' complicity.

11 Now, because these clinics are part of the distribution
12 chain, they are part of this tragedy. And the type of
13 information that we're trying to elicit from them includes
14 information about what representations NECC or MSM employees
15 or others made to the clinics about the quality of the
16 products, about how these products should have been stored,
17 about the need to produce patient names, or the need not to
18 produce patient names, as the case may be; also, NECC's or
19 MSM's representations about whether these clinics were USP
20 compliant for -- or these products were USP compliant, for
21 example.

22 Another reality, though, and one that we have been up
23 front about, is that we anticipate, and based on some
24 production we have seen so far, that the information
25 produced responsive to these subpoenas by clinics, doctors,

1 and hospitals, may show some liability of the clinics,
2 doctors, and hospitals.

3 We have never tried to hide that, right? We recognize
4 it's a reality.

5 We know now that the procedural status is a bit
6 different than it was when we issued these subpoenas
7 originally. At the time that these subpoenas were issued,
8 many clinics had not yet been named as defendants in a
9 federal case in the MDL. That has changed, particularly
10 with the one-year deadline of this tragedy fast upon us, and
11 knowing that there are states involved here, like Tennessee,
12 where that statute of limitations is one year. So there
13 have been a rash of filing additional complaints.

14 There is also a class case that is in the MDL that has
15 been filed on behalf of all victims of this tragedy. So
16 even though there are clinics here who've received subpoenas
17 that may not then have been a named defendant, some, many,
18 now have been named as defendants, and you also have a class
19 case that would implicate those clinics.

20 We also think in reality, based on documents that we
21 have received, that production by the clinics may reveal
22 other entities from which we need to take discovery.

23 We are mindful that the Case Management Order 7,
24 recently imposed by Judge Saylor, contemplates the
25 plaintiffs filing master complaints by November 5.

1 So, to the extent that additional discovery is needed
2 in order to buttress those complaints, we do have a quick
3 time line.

4 All of that is to say, your Honor, that I think the
5 schedule you set is workable. However, given the November 5
6 master complaint deadline, it would be helpful if we could
7 expedite the process a bit.

8 THE COURT: And we had also looked. I believe
9 Judge Saylor has a conference schedule in two weeks; is that
10 about right?

11 MS. PARKER: On October 8.

12 THE COURT: October 8.

13 And that seemed a bit tight for the turnaround. I
14 recognize now, not knowing when I was thinking about this,
15 that you had now updated the chart. But I believe everybody
16 else has not had the opportunity to look at the chart. So
17 that seemed a bit quick to me, to have everyone on that
18 date.

19 The other option is to set a stand-alone date. I was
20 hoping to coordinate and be efficient, just to minimize
21 travel time. I know people are coming from far away, but
22 that is a potential as well, that I could have everyone in
23 for a separate date. So I am happy to hear comment on that
24 as well.

25 Anyone else from the Plaintiff's Steering Committee

1 wish to speak?

2 (No response.)

3 THE COURT: All right.

4 So, why don't we move on. Does anyone wish to comment?
5 Are there any plaintiffs' counsel on the phone that would
6 like to speak.

7 (No response.)

8 THE COURT: All right.

9 Are there any defendants that wish to speak to this
10 issue?

11 MR. GROSSMAN: Good morning, your Honor. Steve
12 Grossman on behalf of the defendants. We're a defendant in
13 the litigation, so we're a little different than some of my
14 other colleagues here who may just be parties to the
15 subpoena.

16 I would like to address sort of the timing issue that
17 was raised by Ms. Parker.

18 These subpoenas have been outstanding for over two
19 months. At no time has anyone from the Plaintiffs' Steering
20 Committee reached out to me and had any discussion about a
21 potential resolution to the issues that we've raised and
22 that they're well aware of. So to come in today and ask for
23 an expedited time frame seems a little disingenuous.

24 We believe that the time frame set forth by your Honor
25 is certainly workable. To the extent that conflicts with

1 Judge Saylor's timing at this point, Judge Saylor has said
2 to all of us in this group and in this case that those
3 deadlines certainly can be amended as needed, and he will
4 revisit those as needed. So I think an important piece here
5 is making sure that we work out a resolution of these issues
6 before this Court and before your Honor. And I think the
7 time frame that you propose -- well, I would actually ask
8 for more time -- I think at this point is certainly
9 reasonable.

10 THE COURT: I may have missed this. Do the
11 defendants have separate objections to the subpoenas?

12 MR. GROSSMAN: We have separate objections and
13 objections to the way in which they were served on us. I
14 really didn't want to get into argument, but certainly the
15 issues -- I've looked at the chart very briefly. I have not
16 had an opportunity to see how complete it is, but even the
17 checkboxes are not accurate to my client.

18 But one of the issues that we have is we were served a
19 Rule 45 subpoena, but we're a party to the litigation, which
20 is improper under Massachusetts law.

21 So there are issues to us that might be a little
22 distinct than many of my colleagues here representing other
23 clinics may have who are not parties to the MDL at this
24 point in time, and, obviously, they'll speak to those as
25 well.

1 THE COURT: All right. Thank you.

2 MR. GROSSMAN: Thank you, your Honor.

3 THE COURT: Any other defendants wish to speak?

4 MR. GERLING: Good morning, your Honor, Brian
5 Gerling for Insight Health Corp. from Virginia.

6 I, like your Honor, was just a little unclear as to
7 where we stood with regard to what was still live,
8 quote/unquote, with regard to the subpoenas. So that's why
9 I'm here today, and I appreciate the mechanism by which your
10 Honor has laid this out. I think this time frame is
11 workable. In fact, Mr. Fennell is from Virginia. It's the
12 first time I've actually met him. Hopefully he and I can
13 get together after this and try to work it out.

14 I think we're in a little bit different situation than
15 the rest of the other parties here. Like Mr. Grossman's
16 client, we are a party to the litigation as well, but I
17 would like to get together with Mr. Fennell after this and
18 try to work this out. I think we can, and I think the time
19 period which you've laid out, your Honor, is going to work
20 well.

21 THE COURT: All right.

22 Any other defendants?

23 MR. ALTHOUSER: Thank you, your Honor. Tom
24 Althouser on behalf of nonparty Harford County Ambulatory
25 Surgery Center, LLC.

1 I think that your Honor's schedule is appropriate. We
2 were talking here briefly, and I wanted to make sure we're
3 now dealing with this latest amended chart is what we should
4 be working from, the one that was just served today. So
5 with that understanding, I think the schedule you've laid
6 out is appropriate, because I know that certainly my clients
7 don't agree with the chart that was provided before as being
8 the only issues. That was one of the other issues. I
9 wasn't sure if this Court was trying to work out something
10 uniform, since this subpoena request for documents was
11 apparently prepared uniformly, certainly not served
12 uniformly, in any fashion, and I wasn't sure. And that's
13 one of the reasons we made the trip today, to find out if
14 you were going to deal with trying to find one uniform
15 request for documents for everybody or whether you were
16 going to deal with it piecemeal, and it sounds like you're
17 going to deal with it piecemeal, and that's fine.

18 I want to point out on the timing issue, since that was
19 brought up, which I didn't expect it would be, but I want to
20 respond to that.

21 Today was the very first tacit admission that I have
22 seen on the record that the purpose of this subpoena was to
23 search for clients. And, in fact, if you look at Document
24 325, which was the first Steering Committee's consolidated
25 response, they took great pains to tell this Court at

1 pages 25 and 26 that they were not looking for anything to
2 establish liability of these various clinics and the like,
3 that their only purpose was to serve notice, just like the
4 Bankruptcy Trustee is charged with.

5 I did not come here with any intention to address any
6 of that issue, but I'm certainly not going to sit here idly
7 by when that's said.

8 Thank you, your Honor.

9 THE COURT: I guess we've also moved on to
10 nonparties as well.

11 MS. MARZULLO: Good morning, your Honor. Michelle
12 Marzullo on behalf of nonparty Baltimore Pain Management
13 Center, and my question really is more just logistical and
14 clarification.

15 I wanted to make sure that -- so we have our new chart,
16 but the subpoena that we're looking at to discuss with
17 regard to this chart, I want to make sure is the
18 accommodation version that was filed with the Court in, I
19 believe, late July, July 17, and not whatever the original
20 subpoena was that was issued to each of the individual
21 clinics and hospitals.

22 THE COURT: And I'll ask the Plaintiffs' Steering
23 Committee to address that question.

24 MS. MARZULLO: Thank you, your Honor.

25 MS. PARKER: Yes, your Honor, the accommodation

1 that was filed is the version that clinics should be looking
2 at, but I will be clear that there is one possible exception
3 to that.

4 Because of some differences in state laws, various
5 clinics received slightly tailored versions of that exhibit.
6 There may have been an additional request, or there may have
7 been different phrasing, your Honor. So the accommodations
8 apply to everyone, insofar as they removed requests, changed
9 time periods, or otherwise materially altered requests. But
10 there may be some specific instances where, for example,
11 Tennessee clinics had an additional request included.

12 The way I would suggest that we deal with that is that
13 I will go back and revisit with the Plaintiffs' Steering
14 Committee members and identify the instances where subpoenas
15 did not match that exhibit, and if we think that needs to be
16 addressed, we'll discuss that with the clinics receiving
17 those slightly different exhibits.

18 THE COURT: And then include the resolution of that
19 in the report?

20 MS. PARKER: Yes, your Honor.

21 THE COURT: That makes sense.

22 All right. Any other non-party objectors?

23 MS. HUMPHREY: Your Honor, this is Kathryn Humphrey
24 in Michigan. My client is Southeast Michigan Surgical
25 Hospital.

1 I have two questions or comments. One is I just heard
2 you, your Honor, refer to a report. Are you talking -- and
3 yet when you laid out your time frame, I think you were
4 talking about a revised chart, and then any other objection.

5 I want to be clear we understand what you are expecting
6 by way of a report.

7 THE COURT: Yes. And thank you for that question.
8 It may have been that I was imprecise in the language that I
9 used, and we will hopefully make this all perfectly clear,
10 although I can't promise that we will issue a scheduling
11 order after I consider everyone's comments here today, but
12 what I envision is that there would be an amended chart. I
13 understand that the Plaintiffs' Steering Committee has
14 already prepared one, but now I have asked them to consult
15 with all interested parties and see if we can come up with a
16 joint chart, hopefully, and, if not, that's why I set
17 another date for objections after that.

18 It may be that with the chart I need some sort of
19 report to explain the differences, and that's why I
20 mentioned "report."

21 But thank you for that question, and you said you had
22 another question as well?

23 MS. HUMPHREY: I do.

24 This is also the first time now that we understand that
25 the Plaintiffs' Steering Committee is expecting us to

1 respond to the accommodation version, what they're calling
2 the "accommodation version" of the subpoena.

3 We were served with an original subpoena. I will --
4 there may be others who are in the same position that my
5 client is in, and that is that there may be different,
6 additional, or fewer objections from our original set and
7 our original motion to quash when we look at the
8 accommodation. So as a part of the process of working with
9 the Plaintiffs' Steering Committee on the revised chart on
10 another chart, other than what, I guess, they've passed out
11 today, we will do that through the prism of the
12 accommodation subpoena.

13 And that is your expectation, your Honor?

14 THE COURT: Yes.

15 MS. HUMPHREY: Okay. Thank you.

16 THE COURT: All right. Any other nonparties wish
17 to speak?

18 (No response.)

19 MS. PARKER: If I may, your Honor?

20 THE COURT: Yes.

21 MS. PARKER: There are a few points I think that
22 will be clarifying, if I could briefly address them?

23 THE COURT: Yes.

24 MS. PARKER: The only -- just for purposes of
25 making sure that everybody is on the same page, I'll take

1 advantage of this opportunity --

2 THE COURT: Absolutely.

3 MS. PARKER: -- and we have counsel on the phone,
4 so forgive me.

5 So that everyone is aware, the only amendments to the
6 chart that we passed out in court today were the removal of
7 some objectors, where those have been removed, and the
8 addition of objections that were filed since the last
9 version of the chart. So there should not have been
10 substantive changes, or moving of Xs, or anything of that
11 nature.

12 In terms of the accommodations, we will, again,
13 recirculate that version to everyone. We are, of course,
14 referring to the version that was filed with the June 17
15 filing. I believe we called it "Plaintiffs' Steering
16 Committee's Consolidated Response to Objections," but we'll
17 make sure that everyone has that.

18 And then one preview for your Honor.

19 Because we have this mediation process ongoing, we
20 understand that there have been several clinics that have
21 asked for extensions of the deadline to opt into mediation.

22 We recognize that there are clinics that may still be
23 interested in participating.

24 In light of that, it is possible -- for clinics that
25 are participating we would, therefore, withdraw the PSC

1 subpoena while they are participating in mediation, at
2 least. Given that, it's possible that the chart that comes
3 back to you may be missing entities. So we will, of course,
4 address them in the response, but so your Honor has a
5 glimmer of what may happen.

6 THE COURT: And that's helpful. This is all going
7 to be a moving target, right? I think the landscape is
8 going to be continually changing and, you know, hopefully
9 we'll just deal with the best information that we have at
10 the time, recognizing that there are continual changes.

11 MS. PARKER: And the last word that I will have on
12 this, your Honor, is the PSC, to be clear, has withdrawn its
13 request to obtain patient information. So none of the
14 information that is participated is sought by means of
15 trying to identify clients or bring additional cases.

16 We did recognize the possibility, and, again, based on
17 some of the documents we've seen, that there may be
18 information that is contained there that goes to liability
19 of other entities, which is the point we were trying to make
20 earlier.

21 And I believe Mr. Fennell would like to be heard on the
22 timing point.

23 MR. FENNEL: Yes, your Honor. Patrick Fennell for
24 the Plaintiffs' Steering Committee. Just a couple of
25 points.

1 One, on the timing issue, I think one of the defense
2 counsel at least requested additional time in addition to
3 the schedule proposed by your Honor. Ideally, the
4 Plaintiffs' Steering Committee would like to have a shorter
5 time line because, as Ms. Parker indicated, because of the
6 master complaint deadline established by Judge Saylor.

7 We think that your Honor's proposed deadline is
8 workable. Ideally, we would like to have sooner dates so
9 that we would have more time to prepare for the master
10 complaint. But certainly we don't think additional time, in
11 addition to what your Honor has proposed, is called for in
12 this case.

13 In addition, since we are going to be working --
14 hopefully working out a lot of details with defense counsel
15 on this, it would be very helpful from our stated point if
16 the defense counsel could get together and appoint among
17 themselves a spokesperson who could represent the positions
18 of the different defense counsel with respect to working out
19 the details on the chart and so forth, if somebody could
20 volunteer to do that.

21 MR. ALTHOUSER: May I respond to that, your Honor?

22 THE COURT: Yes.

23 MR. ALTHOUSER: This is Tom Althouser.

24 I think that goes back to my point of I don't see how
25 that's workable unless we're going to have some uniform

1 document request and we eliminate this charge of saying,
2 This person for this and this person for this. I don't see
3 how we can appoint a committee.

4 If, in fact, the goal is to have one standard request
5 that this Court rules on, like was sent out originally, then
6 I could see how we could appoint some sort of committee to
7 address that.

8 Thank you.

9 THE COURT: Well, I think rather than have me delve
10 into the details at this point -- I am happy to do so if
11 necessary, but perhaps that is a conversation that can take
12 place between the Plaintiffs' Steering Committee and at
13 least, perhaps, the people here today. I don't know if
14 that's a representative sample or not. I don't know the
15 case well enough. But that's certainly something that's
16 worthy of discussion.

17 I will set the schedule. If the parties themselves and
18 nonparties agree with the framework on how to respond and
19 deal with it, they're free to do so.

20 Is there anyone else that would like to speak to any of
21 these issues? I know we haven't heard -- and it may be
22 because these issues are not as germane to them -- from the
23 Unsecured Creditors' Committee or the Trustee, or is there
24 anyone else that would like to speak?

25 MS. DOUGHERTY: Your Honor, Kim Dougherty on behalf

1 of the Plaintiffs' Steering Committee.

2 The only reason we're raising a potential liaison is
3 because we've made every effort to make sure that the
4 clinics that we are aware of have received service of, for
5 example, the accommodation. And we're hearing today that at
6 least two clinics did not have an understanding that all we
7 are now looking for is the subpoena that's set forth in our
8 accommodations to Exhibit C. And so what we're looking to
9 do is at least have someone that we can exchange information
10 with so that we don't have clinics next time we're at this
11 hearing saying, We never got this information.

12 We don't have a master list of all the clinics out
13 there. We have information for clinics, some clinics, and
14 clinics that have appeared on the record. But, for example,
15 all 80 clinics we don't necessarily have contact information
16 for. So we're not looking for a liaison in terms of making
17 particular arguments on behalf of particular clinics, but
18 just someone that we can utilize to disseminate the
19 information and the proposals.

20 THE COURT: All right. Thank you.

21 And someone on the phone wanted to speak?

22 MR. SIRACUSA HILLMAN: Yes, your Honor. This is
23 Benjamin Siracusa Hillman. I represent, together with my
24 colleague Bill Christie, Dr. O'Connell's Pain Care Center
25 and Dr. O'Connell's Pain Care Center, Inc. in New Hampshire.

1 I think, hopefully, this will all be worked out by the
2 process you've outlined, but I just wanted to, I guess,
3 emphasize two things: One is that nonparties, that is,
4 defendants who have not been sued in the MDL, are
5 potentially in a different position than those that have
6 been sued as to what, you know, would be appropriate for a
7 subpoena, for a Rule 45 subpoena, versus a discovery request
8 under Rule 26. And we just want to make sure that as this
9 process goes forward, you know, particularly if some sort of
10 representative of the defendants is appointed, you know,
11 that that takes those distinctions into account.

12 The other issue I think we'd just like to suggest is
13 the need to clarify. The PSC has decided here that they've
14 withdrawn requests to obtain patients' names or
15 patient-identifying information. That was also the subject
16 of Judge Saylor's order on the motion to quash.

17 In our view at least, the accommodation subpoena, which
18 was, you know, issued before the motion to quash was ruled
19 upon, at least that initial piece of it that Judge Saylor
20 addressed, that accommodation subpoena still requests
21 protected health information or patient-identifying
22 information as part of various requests.

23 And so I think it would probably be helpful, from our
24 client's point of view, if the Plaintiffs' Steering
25 Committee could revise the accommodation in such a way to

1 make clear that, you know, no patient-identifying
2 information is being requested, so that that's what we're
3 working off of as a working document.

4 Thank you.

5 MR. FENNELL: Your Honor, the Plaintiffs' Steering
6 Committee can submit a completely revised subpoena which
7 will reflect both the accommodations that we've previously
8 offered in Document 325, as well as Judge Saylor's ruling on
9 the issues regarding physician-patient privilege and so
10 forth.

11 THE COURT: I think that would be helpful.

12 MS. PARKER: To be clear, though, your Honor, we
13 would not imagine any substantive changes. So to the extent
14 that it's unclear and it may still seem to call for
15 patient-identifying information, we will revise that. But I
16 wouldn't want clinics to think that we are going to
17 materially change the documents or change the requests that
18 we have already served upon them beyond clarifying that
19 patient-identifying information piece.

20 THE COURT: And in terms of a mechanism and so that
21 I will have the benefit of it in reaching the objections, do
22 you propose submitting it with the chart and/or the report,
23 or how would you propose circulating it and then submitting
24 it?

25 MS. PARKER: We would hope to submit it much sooner

1 than that, your Honor. We think this is a reasonable
2 request, but one that could be dealt with very quickly, and
3 we would want clinics and subpoena recipients to have the
4 benefit of that information as soon as possible.

5 THE COURT: All right. That makes sense.

6 All right, does anyone else wish to speak?

7 MS. HUMPHREY: Your Honor, this is Kathryn Humphrey
8 in Michigan again.

9 The gentleman -- well, Mr. Siracusa Hillman spoke to
10 this, but someone else did as well, Mr. Grossman, I think.
11 There are significant differences among the various
12 non-party objectors and certainly between the nonparties and
13 the defendants who are before you today, and this is why
14 having some kind of a spokesperson or a liaison person is a
15 difficult objective.

16 For example, my client, my client hospital, has no
17 patients who are a part of the outbreak, none. So that may
18 be -- that puts us in a different position than some
19 hospital or clinic that may be, from the Plaintiffs'
20 Steering Committee's perception, right in the thick of
21 things.

22 I just wanted to make that point.

23 If the Court is thinking that there might be some very
24 simple fix to this problem of having 80 subpoenas, we've
25 talked about this issue among ourselves, and we don't see a

1 simple answer.

2 THE COURT: I guess I'm doubtful that there's a
3 simple fix to any issue in this case --

4 (Laughter.)

5 THE COURT: -- but perhaps I will be proved wrong.

6 MS. HUMPHREY: Right.

7 THE COURT: Does anyone else wish to speak?

8 (No response.)

9 THE COURT: All right. So what I am going to do is
10 I'm going to carefully consider everything that's been
11 raised here. I will, hopefully, issue a scheduling order
12 before the week is out, and we will go from there.

13 Thank you very much.

14 MS. PARKER: Thank you, your Honor.

15 MR. GERLING: Thank you, your Honor.

16 MS. DOUGHERTY: Thank you, your Honor.

17 MR. GROSSMAN: Thank you, your Honor.

18 MR. FENNELL: Thank you, your Honor.

19 MR. ALTHOUSE: Thank you, your Honor.

20 MS. WATSON: Thank you, your Honor.

21 THE CLERK: All rise.

22 (Proceedings adjourned.)
23
24
25

C E R T I F I C A T E

I, James P. Gibbons, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/s/James P. Gibbons

October 2, 2013

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